ORIGINAL

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other	)	
Customer Information	)	

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384 (1980), recon., 84 FCC 2d 50 (1980), further recon., 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983) ("Computer II").

Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (Computer III Phase I Order), recon., 2 FCC Rcd 3035 (1987) (Phase I Reconsideration Order), further recon., 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration Order), second further recon., 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration Order); Phase I Order and Phase I Reconsideration Order vacated California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (California I); Phase II, 2 FCC Rcd 3072 (1987) (Computer III Phase II Order), recon., 3 FCC Rcd 1150 (1988) (Phase II Reconsideration Order) further recon., 4 FCC Rcd 5927 (1989) (Phase II Further Reconsideration Order); Phase II Order vacated, California I, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd 7719 (1990) (ONA Remand Order), recon., 7 FCC Rcd 909 (1992), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993) (California II); Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (BOC Safeguards Order), BOC Safeguards Order vacated in part and remanded, California v. FCC, 39 F.3d 919 (9th Cir. 1994) (California III), cert. denied, 115 S. Ct. 1427 (1995) ("Computer III").

Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. (1996) ("Joint Explanatory Statement").

SUMMARY

For purposes of implementing the customer proprietary network information (CPNI) requirements of Section 222, MCI supports a definition of "telecommunications service" that groups all regulated services into one of two categories -- local or interexchange. CMRS providers do not constitute a separate category of carriers that will be entering new service markets as a result of the new legislation, and the purposes of Section 222 therefore would not be furthered by treating CMRS providers as a separate service category. The Commission accordingly should treat CMRS as a type of service that can fit into either of the two main categories.

Customer approval required under Section 222(c)(1) and pertaining to a customer's CPNI may be either oral or written and carriers should be able to obtain approval in any manner, including during telemarketing calls. MCI agrees that customer approval must be preceded by notification -- which can be oral -- that reasonably informs the customer of both the nature of the approval request and the proposed use of CPNI.

The Commission should preempt more restrictive state CPNI rules because they could undermine and negate the Commission's goal of facilitating the development of competitive interstate and intrastate services.

Under Section 222(c)(2), third parties who seek CPNI should be allowed to submit requests to carriers electronically, similar to the manner in which primary interexchange carrier change requests are transmitted.

Given the advantages enjoyed by the BOCs and GTE because of their control over local exchange networks, the Commission's CPNI safeguards with respect to enhanced services marketing should apply to all possible uses of CPNI by the BOCs and other incumbent LECs. There also is no reason to abandon any of the Computer III CPNI requirements pertaining to enhanced service marketing and, therefore, these rules should be retained for the BOCs and GTE and applied to all incumbent LECs above a certain size threshold, given their similar control over local exchange networks. There is no reason, however, for the Commission to impose similar requirements on carriers other than incumbent LECs.

Subscriber list information (SLI) must be made available in an electronic format, with daily updates, and with all the identifying notations that LECs currently have in their databases. SLI should be provided on terms and at rates established in the same manner as those for unbundled network elements under Sections 251 and 252 of the Act. Thus, SLI should be priced at no greater than "total service long run incremental cost" or TSLRIC.

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MCI Telecommunications Corporation (MCI), by its undersigned counsel, hereby responds to the Notice of Proposed Rulemaking initiating this proceeding (NPRM).[1] The NPRM seeks comment on the Commission's tentative conclusions as to the implementation of the new Section 222 of the Communications Act of 1934, as amended, added by Section 702 of the Telecommunications Act of 1996 (1996 Act).[2] Section 222 sets forth restrictions on carriers' and others' use of customer proprietary network information (CPNI) and related information. MCI supports the Commission's dual goals in this proceeding of implementing Section 222 in a way that protects customer privacy and facilitates fair competition.[3] As will be explained, MCI's

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[1] FCC 96-221 (released May 17, 1996).

[2] Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §§ 151 et seq.

[3] NPRM at ¶ 15.

policy recommendations balance those goals.

Background

Section 222(c) sets out the main restrictions on the use of CPNI, and Section 222(d) establishes three exceptions to those restrictions. Section 222 also sets forth certain requirements related to the availability of "subscriber list information," which is not included within the definition of CPNI.[4] The 1996 Act also established a new Section 275(d) of the Communications Act that prohibits local exchange carriers (LECs) from using information obtained from calls made to alarm monitoring service providers to market their own (or others') alarm monitoring services.

The NPRM reviews the Commission's current CPNI requirements, established in its Computer II and Computer III proceedings,[5] governing the use of CPNI for the marketing of enhanced services and customer premises equipment (CPE) by AT&T, the Bell Operating Companies (BOCs) and GTE. Although the current CPNI rules are more limited in scope than the provisions of Section 222, the current CPNI rules and the decision upholding those rules -- California v. FCC, 39 F.3d 919, 933 (9th Cir. 1994) -- offer some

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[4] See Section 222(f)(1).

[5] See NPRM at nn. 8-9, 12-19, 21-25. In order to save space, MCI will not repeat those or any other lengthy citations in these comments but rather will use the abbreviated citation conventions adopted in the NPRM. The full citations are also set forth in the Table of Authorities, supra.

useful guidance in implementing Section 222.[6]

A. Scope of "Telecommunications Service"

Absent customer approval, Section 222(c)(1) permits the use or disclosure of CPNI by a carrier only "in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service...." (Emphasis added). The NPRM raises the question as to how broadly or narrowly the term "telecommunications service" should be interpreted. MCI generally agrees with the Commission's tentative approach on this issue, at least as to its reliance on the local and interexchange regulated service categories.

As the NPRM observes, the intent of this provision was to protect the CPNI already in the possession of carriers, particularly the BOCs, as they started to move into new service markets as a result of the 1996 Act.[7] Since BOCs are already providing a full range of local and intraLATA toll services, this purpose of the provision would not be furthered by prohibiting

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[6] A preliminary issue raised in the NPRM is whether, and to what extent, inconsistent intrastate CPNI rules may be preempted by the Commission. Since the preemption analysis that is necessary in this type of situation must be predicated on the federal rules to be adopted and the impact that inconsistent state regulation might have on such federal rules, MCI will discuss the preemption issue out of order, in Part C, infra, after outlining the basic CPNI rules that it believes should be promulgated.

[7] NPRM at ¶ 24 & n.60.

the BOCs from using CPNI, obtained in the provision of one local or intraLATA toll service, in connection with another such service. Similarly, since interexchange carriers (IXCs) are already providing a full range of interexchange services, the purpose of this provision would not be furthered by prohibiting IXCs from using CPNI, obtained in the provision of one interexchange service, in connection with another interexchange service. Thus, the "telecommunications service from which such [CPNI] is derived," in Section 222(c)(1)(A) should be read to include all of the regulated services in the same general category.

The NPRM actually proposes a three-way split -- among local, interexchange and commercial mobile radio services (CMRS).[8] It is not clear to MCI that CMRS fits into this paradigm, since both BOCs and IXCs, as well as other types of providers, have been offering CMRS for some time and thus already possess CPNI obtained in the provision of CMRS along with the CPNI obtained in the provision of their other services. CMRS providers, therefore, do not constitute a separate category of carrier that will be entering new service markets (local or interexchange) for the first time as a result of the 1996 Act, especially since all CMRS calls are either local or interexchange in nature.

MCI urges the Commission, therefore, to treat CMRS in the

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[8] Id. at ¶ 22.

same manner as the Commission proposes to treat intraLATA toll service -- namely, as a type of service that can fit into either the local or interexchange category and that should be treated the same as the predominant category provided by the carrier in question.[9] Thus, an IXC ought to be able to use CPNI obtained in the provision of long distance service for CMRS marketing -- and vice-versa -- but not for local service marketing in the absence of customer approval. Similarly, a LEC ought to be able to use CPNI obtained in the provision of local service for CMRS marketing -- and vice-versa -- but not for long distance service marketing in the absence of customer approval.

The NPRM does not directly address some related problems that may require explicit Commission rules. Carriers possessing CPNI obtained in their provision of one service category often have affiliates providing services in another category and still others providing unregulated enhanced services. Some carriers offer more than one category of service (e.g., local and interexchange) out of the same affiliate. In order to carry out the general CPNI protection principles expressed in Sections 222(a) and (b), the Commission's CPNI rules should address all of these situations to make clear that, for example, a LEC should not be allowed to provide local service CPNI to its long distance

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[9] See NPRM at ¶ 22 n. 59.

or enhanced service affiliate without customer authorization.[10] Moreover, where a carrier is now providing both local and interexchange services, the CPNI already obtained thereby should be divided between the two categories according to the service category in which it was originally obtained in such a manner as to prevent any future unauthorized use for the other category of service. This problem of CPNI derived from more than one category of service makes the safeguards discussed in Part E, infra, especially crucial.

One other related issue not addressed in the NPRM is the problem of LEC use of CPNI derived from the LEC's rendering of billing services to IXCs. The Commission should make it clear that a carrier's use of CPNI of another carrier's customer, which the first carrier obtains in the course of providing billing service to the second carrier, violates the general CPNI protection principles set forth in Section 222(a) and (b).

Finally, the NPRM also requests comment on the use of CPNI to perform installation, maintenance and repair in connection with the provision of service. MCI agrees that such functions would fall within the category of "services necessary to, or used in, the provision of" the service category in which the CPNI was

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[10] Restricting BOC affiliates' access to CPNI obtained by the BOC had been the main focus of Section 102 of the original Senate bill, from which Section 222 is derived. See Joint Explanatory Statement at 203.

derived.[11] Thus, CPNI derived from the provision of one service category could not be used in the performance of such functions in connection with another service category.[12]

B. Customer Notification and Approval

The restrictions of Section 222(c)(1) apply "[e]xcept ... with the approval of the customer." Thus, once such "approval" is obtained, the carrier may use the customer's CPNI for marketing or other purposes. Moreover, Section 222(c)(2) specifically requires that "[a] telecommunications carrier shall disclose [CPNI], upon affirmative written request by the customer, to any person designated by the customer." The NPRM requests comment on how such "approval" and "affirmative written request" should be manifested.[13]

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[11] See NPRM at ¶ 26 (quoting Section 222(c)(1)(B)).

[12] The NPRM asks whether the first exception in Section 222(d), which allows the use or disclosure of CPNI "to initiate, render, bill, and collect for telecommunications services," (Section 222(d)(1)), would also allow CPNI to be used to perform installation, maintenance and repair in connection with another service category. If that exception were to be read to allow the use of CPNI in connection with a service category other than the service category in which the CPNI was obtained, however, "initiate" and "render" are such broad terms that this exception would almost swallow the entire general restriction in Section 222(c), since it would seem to allow the use of CPNI for almost any purpose for all services. The most sensible reading of this exception would appear to be as a more specific elaboration on the authorization provided in Section 222(c)(1)(B) for the use or disclosure of CPNI in the provision of "services necessary to, or used in, the provision of" the service from which the CPNI was derived.

[13] NPRM at ¶¶ 27-34.

It is clear from the contrasting language in the "approval" and "affirmative written request" requirements that Congress did not intend that a carrier necessarily would have to secure the customer's "affirmative written request" before using the customer's CPNI itself. The stronger language applies only to disclosures to third parties, and such disclosure is mandatory upon such "affirmative written request." Thus, the disclosure of CPNI to third parties in Section 222(c)(2) is an obligation that the carrier has to the subscriber, while the use or disclosure of CPNI with the customer's "approval," in Section 222(c)(1) is something that the carrier may do for its own purposes.

Congress' deliberate decision in Section 222(c)(1) not to require written approval before a carrier may use a customer's CPNI, juxtaposed with its decision in Section 222(c)(2) to require an "affirmative written request" for disclosure to third parties, indicates that the purposes of Section 222(c)(1) would be met by either oral or written approval.[14] MCI also submits

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[14] This inference is not negated by the use of the term "approves" in subsection (d)(3) of Section 222, which provides an exception to the restrictions in Section 222(c) for the use or disclosure of CPNI "to provide any inbound telemarketing, referral, or administrative services for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service." This exception appears to allow the use of a customer's CPNI for the marketing of other services upon his or her oral approval in the course of his or her call to the carrier. Thus, if oral approval is also sufficient to allow such CPNI use under Section 222(c)(1), it might be argued that there is some overlap between the two "approv[al]" provisions.

Such an overlap, however, does not preclude the

that it should be possible for carriers to obtain such oral approval at any time prior to their use of such CPNI, including during outbound telemarketing calls.[15]

MCI agrees with the Commission that, in order for a customer's approval to be meaningful, it must be preceded by notification to the customer reasonably informing him or her of the nature of the request for approval and the proposed use of CPNI. It is worth noting that the current CPNI rules relating to BOC provision of enhanced services do not require prior written

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interpretation of Section 222(c)(1) sought here. Each of the three exceptions in subsection (d) is clearly intended to allow the use of CPNI in specific situations, irrespective of whether some of those situations might also be covered by the general rule in subsection (c). Subsection (d)(3), for example, addresses the inbound calling situation, which has been a particular focus of controversy under the current CPNI rules. See BOC Safeguards Order, 6 FCC Rcd. at 7613-14.

Moreover, the use of the term "approval" in subsection (c)(1) and "approves" in subsection (d)(3) indicates, if anything, a Congressional intent to construe those terms similarly, whatever overlap might result. See Comm'r of Internal Revenue v. Lundy, 116 S. Ct. 647, 655 (1996)(identical words used in related parts of the same act are intended to have the same meaning). Finally, any overlap would be eliminated if the approval in Section 222(c)(1) were to be construed to require a prior oral notification, as MCI proposes, infra, while Section 222(d)(3) were to be construed not to require such notification, which seems reasonable in the inbound calling situation addressed in that exception.

[15] It should be noted that the Commission has previously stated that a prior authorization rule for customers with 20 or fewer lines would cause such customers "to deny authorization ... by default and thus to frustrate development of the market" (see Brief for Respondents at 72, People of the State of California v. FCC, No. 92-70083 (9th Cir. filed July 14, 1993)(quoting BOC Safeguards Order, 6 FCC Rcd. at 7609-10)), which militates strongly in favor of the least burdensome approval requirement possible here.

notification to residential and single-line business customers.[16] Although those CPNI rules were promulgated under the Commission's general rulemaking authority, rather than pursuant to a specific grant of authority, such as Section 222, the Commission nevertheless found that the CPNI rules balanced customer privacy rights and competitive interests,[17] and the revised CPNI rules were upheld on appeal.[18] Since those are also the main goals of Section 222, the Commission's current CPNI rules strongly suggest that prior written notification is not necessary to protect customer privacy rights. Moreover, since, as discussed above, "affirmative written authorization" is not necessary to satisfy the "approval" requirement, it seems logical that prior written notification would not be a necessary prerequisite to such approval. Accordingly, oral notification should be a sufficient predicate for approval.

It follows that such oral notification could be provided in the course of the same outbound telemarketing call during which the customer's approval is communicated, as long as the

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[16] See discussion in NPRM at ¶ 5.

[17] See Computer III Phase II Order, 2 FCC Rcd. at 3096. This aspect of the CPNI rules was repromulgated in the BOC Safeguards Order, 6 FCC Rcd. at 7613 & n. 167.

[18] See California, 39 F.3d at 931 ("the FCC balanced the competing interests of competitive equity, customer privacy, and the need for efficiency in the development of mass market enhanced services.")

notification is given prior to the approval.[19] In fact, it would be preferable for the notification to be provided as close in time as possible to the customer's approval in order to ensure that the approval is granted with a complete understanding of the use of CPNI that the customer is approving. MCI does not believe that there is any need at this time for the Commission to promulgate any rules specifying the manner or timing of such oral notification, except that it should be reasonable and non-deceptive.

MCI would support any reasonable verification method to ensure compliance with an oral notification and approval requirement, whether by recording the conversation or requiring the carrier to institute procedures to secure identifying data at the time such approval is granted. Any of these verification techniques would make oral approval as "specific and verifiable" as written approval would be,[20] without the burdens attendant to written approval.

The Commission also requests comment as to whether it should establish requirements regarding how long a customer's CPNI use authorization should remain valid, how often carriers may contact

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[19] Thus, under MCI's suggested approach, oral notification would be required in any situation other than an inbound call (i.e., from the customer to the carrier) covered by the exception in subsection (d)(3) (see n. 14, supra), but could be provided in the same outbound call during which the customer's approval is granted.

[20] See NPRM at ¶ 29.

a customer in attempting to obtain CPNI use authorization, and whether and to what extent customers may authorize partial access to their CPNI. MCI does not believe that any action on these sub-issues is warranted at this time. Customer approval should remain valid unless and until the customer revokes it, which could also be done orally. There also does not appear to be any reason to place any specific limits on carriers' attempts to secure CPNI use approval, at least any greater limits than are imposed on any other type of telemarketing calls. Customers who do not want to be contacted may put their names on no-call lists, just as they do now. There also does not appear to be any reason to require carriers to specifically offer customers partial authorization options, although any limitations placed by a customer on his or her approval of CPNI use should be honored by the carrier.

C. Scope of the Commission's Authority and Preemption of Inconsistent State CPNI Rules

MCI submits that the California decision upholding the current CPNI rules governs the issue of preemption and compels the conclusion that the Commission may preempt inconsistent state CPNI rules that are more restrictive than the rules the Commission ultimately adopts here. As in that case, stricter state CPNI rules "would negate" the Commission's goal of facilitating the development of "a mass market" for competitive

services.[21]

For example, a state requirement that written notification must be provided and written approval obtained before CPNI may be used for marketing another service category would thwart the competitive balance embodied in a Commission rule requiring only oral notification and approval. As the Commission previously found in the Computer III CPNI context, prior written authorization would not be granted in most cases.[22] Oral approval, on the other hand, would be considerably easier to secure. Even if a state written notification and approval rule were limited to the use of CPNI for the marketing of intrastate services, such a requirement would disrupt interstate service marketing, since it would be impractical to limit marketing to interstate services. The distinctions between interstate and intrastate services are becoming harder to maintain as the convergence of services creates inextricably intertwined packages. Having to maintain artificial marketing distinctions among services will raise costs for all of them, including interstate services.

Similarly, more restrictive intrastate CPNI rules regarding service boundaries would also inhibit interstate service marketing. For example, a state that prohibited the use of CPNI

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[21] California, 39 F.3d at 933.

[22] See BOC Safeguards Order, 6 FCC Rcd. at 7609-10.

for the marketing of any new intrastate features or services without customer authorization would disrupt IXC combined marketing of interstate and intrastate interexchange services, which, under the scheme proposed in the NPRM, could be done using CPNI without customer approval.

Thus, more restrictive state CPNI rules would have a disruptive effect on the marketing of interstate services analogous to the impact of more restrictive state rules found in the BOC Safeguards Order.[23] Preemption of more restrictive state CPNI rules is therefore equally justified here.[24]

Moreover, as MCI has previously explained, the new Sections 251-53 of the Communications Act, added by Section 101 of the 1996 Act, recognize a strong federal interest in the competitive provision of intrastate telecommunications services, irrespective of the jurisdictional boundaries previously established in Section 2(b) of the Communications Act.[25] Furthermore, Section

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[23] See id. at 7636 (discussing impossibility of marketing interstate services jointly while marketing intrastate services separately).

[24] See California, 39 F.3d at 933. Such "conflict" preemption would not be precluded by Section 601(c) of the 1996 Act, which prohibits any implied preemption of state law. See California Federal Savings and Loan Ass'n v. Guerra, 479 U.S. 272, 280-81 (1987) (analyzing conflict preemption separately from implied preemption).

[25] See Comments of MCI Telecommunications Corporation at 7-9, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (filed May 16, 1996).

251(c)(3) also assures nondiscriminatory access to unbundled network elements, "including subscriber numbers, databases, signalling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service,"[26] which clearly encompasses CPNI. Finally, Section 253 authorizes the Commission to preempt any state law or regulation that probibits the ability of any entity to provide any intrastate telecommunications service.

Given the importance of CPNI in ensuring intrastate service competition, recognized in Section 251(c)(3), and the authority provided to the Commission by Sections 251-53 to facilitate the development of local and other intrastate competition, Section 253 clearly allows the Commission to preempt any state restriction on the use of CPNI that interferes with the competitive balance struck in this proceeding, whether the impact of such restriction is on interstate or intrastate services. Thus, for example, state CPNI rules that would prohibit the use of CPNI to market local and other intrastate services otherwise allowed by the rules established under Section 222 would thwart this Commission's (and Congress') goal of developing intrastate service competition and should be preempted under Section 253.

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[26] Section 3(45) of the Communications Act, added by Section 3 of the 1996 Act.

D. CPNI Disclosure to Third Parties

The NPRM requests comment on whether safeguards should be imposed to guard against unauthorized disclosure of CPNI to third parties under Section 222(c)(2). Typically, a written request to disclose CPNI to a third party under Section 222(c)(2) will be obtained from the customer by the third party, rather than by the customer's current carrier. Where a third party seeking a customer's CPNI transmits a copy of the customer's request to the carrier, the carrier should then be obligated to turn over the customer's CPNI to the third party.

Third parties seeking CPNI should also be allowed to submit requests to carriers electronically, in batch mode, without having to transmit copies of the customers' requests, similar to the manner in which primary interexchange carrier change requests are transmitted. Such third party electronic requests could be supported by a prior verification to the effect that the third party will only submit such requests in cases where it has a written customer request in its possession. In order to provide further assurance to carriers, such verifications could be backed up by agreements to indemnify the carrier for any damages resulting from unauthorized disclosures. This approach would permit parties requesting CPNI to enter into contractual arrangements with carriers providing for such electronic CPNI requests. The customer's affirmative written request to disclose his or her CPNI, together with the third party verification and

indemnification, would serve as a sufficient safeguard against unauthorized disclosure. If any problems in this area were to arise in the future, the Commission could always take action then.

E. Safeguards for CPNI

The NPRM notes that the Commission has imposed various safeguards on AT&T, the BOCs and GTE to protect against unauthorized access to customers' CPNI by their employees and third parties and requests comment on whether these or similar safeguards should continue to be imposed on those carriers and whether they should be imposed on all carriers.[27] Presumably, since another portion of the NPRM, discussed in Part F, infra, addresses the possible continuation of the Computer III CPNI rules in the enhanced services context,[28] the Commission is focusing here on whether the current CPNI safeguards in the enhanced services context should be applied to all other uses of CPNI.

For example, BOC employees' access to BOC CPNI databases is subject to passcode and other restrictions under the current rules regulating CPNI use for enhanced services marketing. One issue that this portion of the NPRM seems to raise is whether BOC employee access to CPNI should continue to be subject to such

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[27] NPRM at ¶¶ 35-36.

[28] See NPRM at ¶¶ 38-42.

restrictions where the employee wants to use the CPNI for some purpose other than enhanced services marketing, such as long distance service marketing, and whether similar restrictions should be utilized by all carriers.

Given the competitive advantages enjoyed by the BOCs and GTE in terms of their control over their subscriber bases, MCI submits that they should continue to be subject to the same CPNI safeguards, with respect to all possible uses of CPNI, that are imposed on them now with respect to enhanced services marketing. The case for such treatment is especially compelling in light of the fact that the same BOC personnel will probably be involved in long distance service, enhanced service and other competitive service marketing, often in the same call to the customer, making different levels of access restrictiveness unworkable.[29] Moreover, their CPNI database restrictions are already in place, thus minimizing any start-up burden, and it would be much simpler and therefore more foolproof to have the same CPNI restrictions continue to apply across-the-board. The same safeguards should also be applied to all incumbent LECs above a certain threshold size, given their similar control over the local exchange network.

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[29] The case for continuation of the same safeguards for AT&T's CPNI is possibly less compelling. If, however, the Commission decides to continue the Computer III rules for AT&T, however, including the safeguards, it would be reasonable to apply those safeguards across-the-board to AT&T's CPNI.

At this point, however, there is no reason for the Commission to impose similar safeguards on non-incumbent LEC carriers. Given non-LECs' lack of monopoly control over their subscriber base, normal competitive incentives will be more than adequate to prevent such carriers from misusing their customers' CPNI. Moreover, responsible competitive carriers could be expected, as a matter of good business practice, to institute internal security systems to protect CPNI against improper disclosure. All that is required for non-LECs is a general directive to institute and maintain such systems.

F. Applicability of Computer III CPNI Requirements

There is no reason to abandon any of the Computer III CPNI requirements pertaining to enhanced service marketing. Enhanced service competition remains an important segment of the telecommunications market, and the BOCs and GTE, as a result of their continuing control over the local exchange subscriber base, retain their overwhelming advantages vis-a-vis independent ESPs. The conditions that led to the promulgation of the Computer III CPNI rules therefore still obtain and they should be retained along with the additional restrictions imposed in this proceeding. If anything, in order to conform to the even-handed spirit of Section 222, the advantage given to the BOCs by the current asymmetrical CPNI restrictions applicable to customers

with 20 lines or less[30] should be eliminated by imposing affirmative customer approval requirements on BOCs as well as ESPs before a customer's CPNI may be used for enhanced services marketing to that customer.[31]

MCI agrees with the Commission's tentative conclusion that there is no reason to extend its Computer III CPNI rules to any

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[30] Now, BOCs may use such CPNI for enhanced services marketing unless the customer has expressly requested that its CPNI not be used by BOC enhanced services personnel, while ESPs cannot have access to such CPNI unless the customer has positively requested such disclosure. See discussion in NPRM at ¶ 5.

[31] Moreover, since the CPNI rules were part of a regime of nonstructural safeguards that was substituted in the BOC Safeguards Order for the structural separation rules governing BOC enhanced services, they cannot be weakened without undermining the Commission's already precarious cost-benefit policy balance. See BOC Safeguards Order, 6 FCC Rcd. at 7614-25. As it was, the balance struck in that order could not withstand judicial review because the Commission had not explained how another element of the nonstructural safeguards -- Open Network Architecture -- offered sufficient protection to justify abandonment of the structural separation rules. See California, 39 F.3d at 930.

In the pending Computer III Further Remand Proceedings, the Commission is now attempting to reassess the balance to determine whether the nonstructural safeguards can be substituted for structural separation. See Notice of Proposed Rulemaking, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20, FCC 95-48 (released Feb. 21, 1995). Since the Commission has already been reversed twice on this issue -- first in California v. FCC, 905 F.2d 1217 (9th Cir. 1990), and then in California, 39 F.3d at 930 -- and must consider every significant element of its policy balance to withstand judicial review (see Union of Concerned Scientists v. United States Nuclear Regulatory Commission, 880 F. 2d 552, 561 (D.C. Cir. 1989)(omission of important element in cost benefit analysis will prompt review)), it would not be prudent to weaken any element of the nonstructural safeguards if the Commission finally hopes to craft a defensible resolution of this issue on its third try.